35099-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAY FRIEDRICH,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Evaluating the warrant in a commonsense manner rather than hypertechnically and resolving all doubts in favor of the warrant, did Judge Hedine abuse his discretion in -

   a) finding probable cause to support the search warrant where the affidavit established the evidence was likely to be found at the place to be searched because the child pornography had been uploaded less than a month earlier and because the contraband was of the type that is likely to be held in a computer or cell phone or drive for many years and is likely to be kept in a location easily accessible to the user?

   b) authorizing the seizure of items sufficiently described and

related to the crime for which probable cause existed?

2. The Defendant has a strong employment history, minimal debt, no health concerns, no addiction concerns, the ability to work, and the ability to pay LFO's. If the State substantially prevails on appeal, is there any basis not to impose appellate costs upon him?

IV. STATEMENT OF THE CASE

The Defendant Jay Friedrich appeals from convictions of dealing and possessing child pornography. CP 76-84, 102-03, 123-24.

On March 30, 2016, Microsoft reported to ICAC (Internet Crimes Against Children) Seattle that they learned that same day[1] that a user had uploaded suspected child pornography via a Skype[2] account. CP 39, 58. ICAC determined that the user was in Walla Walla, and on April 12, the matter was referred to Walla Walla detective Knudson. CP 58.

On April 13, the detective obtained a search warrant for the

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[1] Contrary to the Defendant's factual statement (AOB at 3), the affidavit in support of warrant does in fact explain what it means for a service provider to become aware of an upload. CP 52-53.

[2] The Defendant's factual statement (AOB at 6) misstates what Skype is. Skype is a telecommunications application for video chats, voice calls, or instant messaging. https://www.skype.com/en/about/ It is not storage. An upload would only be in the context of an instant message and would necessarily result in receipt by another Skype account user. Microsoft becomes aware of information "passing through its network." CP 53.

subscriber information at Charter Communications. CP 59. Charter responded to the warrant on April 21, permitting the detective to identify the Defendant as the user and to confirm his residence. CP 59. The Defendant is a registered sex offender and had been investigated in 2012 for possessing images of nude teenage and preteen girls on his computer.[3] CP 59.

On April 27, the detective obtained a search warrant for the Defendant's home, which he served the next day. CP 40, 73. This was less than a month after the Defendant uploaded the image. The warrant permitted the search of the home and detached garage and the seizure of records, whether printed or stored in electronic format, pertaining to the production, possession, receipt, or distribution of child pornography. CP 60, 70-73. The warrant went into great detail to describe all possible document storage formats. CP 70-73. The Defendant admitted to police that his electronics would contain images of underage girls. CP 40. And, in fact, police discovered child pornography on the Defendant's computers and cell phone. CP 40-41.

The Defendant filed a motion to suppress the evidence obtained via the warrant. CP 5. He argued the warrant was overbroad insofar as it

[3] Contrary to the Defendant's factual statement (AOB at 4), the affidavit alleged more than just the single uploaded image.

authorized seizures of "contraband, fruits of a crime, or things otherwise criminally possessed" and evidence of "any crime." CP 9. The lower court found this argument mischaracterized the content of the warrant. CP 74-75. The preface of the four-page warrant included an initial broad "whereas" clause mirroring the language in CrR 2.3(b) and authorizing a search warrant for:

> ... evidence of a crime; contraband, the fruits of the crime, or things otherwise criminally possessed; weapons, or other things by means of which a crime has been committed or reasonably appears about to be committed.

CP 74-75. The clause was immediately followed by "to wit" language naming the crime alleged to have been committed and providing highly specific descriptions of what was to be seized. CP 70-73.

After the denial of the motion[4], the Defendant proceeded by way of a stipulated facts trial. CP 79-79, 85-88. The Defendant stipulated to facts sufficient for the court to find him guilty of one of the four counts of dealing. CP 77-79; CP 80, FF1; CP 82, FF 9. That count[5] regards the transfer or dissemination of an image from one of his devices to another.

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[4] The Defendant observes a scrivener's error at CP 85, FF 1. AOB at 15, n.12. The record actually describes an upload on Skype, not a download. CP 58.

[5] The Defendant claims this is error, apparently assuming that this count would address only the upload to Skype described in the warrant. AOB at 1; AOB at 3, n.1. However, the Defendant appears to have stipulated to a different count. This is not error.

CP 82-83, CL 1 (describing transfer between the Defendant's Hewlett Packard computer and Samsung phone). He also stipulated to possession on four different devices. CP 77-78, FF 6-9.

At sentencing, the court reviewed the presentencing investigation (PSI), which provided facts from which the court could determine the Defendant's ability pay legal financial obligations (LFO's). CP 89-101. The PSI found the Defendant had:

> a fairly conventionally life ... substantially different from what I typically hear from offenders, does not appear to have the substance abuse or mental health problems so typical to this population, graduated from High School and has worked fairly steadily throughout his life.

CP 96.

Born April 18, 1964, the Defendant was 52 at the time of conviction. CP 1, 102. After graduating from high school, the Defendant worked in Communications in the Navy for six years, and was enlisted in the Reserves from 1993-96. CP 93-94. He had a 3.25 GPA at the Oregon Institute of Technology where he pursued a degree in finance before dropping out a semester before graduation due to lack of funding. CP 94. He is interested in continuing his education. CP 94.

He has "worked fairly steadily in "jobs ranging from lawn-care to food service, warehousing and janitorial." CP 94. In 2001, he served six

months for a conviction of assault in the second degree with domestic violence and sexual motivation. CP 92. After he completed supervision on that matter, he moved to Walla Walla where he worked at an insulation company and then at the Elks Lodge in maintenance for five years, then at the Farmers Co-op for four years, and finally at Walmart full time for three years when he was arrested on this matter. CP 94. He rent (inclusive of utilities, internet, and cable) was $500/mo. CP 96.

He is physically active, working in stocking and occupying himself with yard work and maintenance. CP 96. He has no substance abuse or mental health issues. CP 96-97. He does not receive public assistance. CP 94. And he has no children to support. CP 95. The Defendant reported that "finances aren't a big stressor for him." CP 95.

The Defendant has four older siblings (53, 55, 57, and 60 years old) living in Washington and Oregon. CP 95. The three closest in age to him have all offered support in varying ways. CP 95. He is welcome to live with either sister upon his release from incarceration. CP 95.

At sentencing, the court imposed $800 in LFO's, which can paid at $25/mo beginning 90 days after his release. CP 104.

V. ARGUMENT

The Defendant raises the question of staleness for the first time in this appeal. While the Defendant previously claimed the warrant was overbroad, on appeal he challenges different language in the warrant, making different claims from what was argued at the trial level. The superior court did not address either challenge to the warrant that is raised in this appeal. The Court may decline review. *State v. Higgs*, 177 Wn. App. 414, 423, 311 P.3d 1266 (2013) (refusing to consider a claim of overbreadth where the suppression claim raised to the superior court did not address this).

The claim of manifest constitutional error (under RAP 2.5(a)(3)) is not justified. Considering the strength of the warrant and under the legal standards, which resolves all doubts in favor of the warrant, the Defendant cannot demonstrate actual prejudice. *State v. Bates*, 196 Wn. App. 65, 75, 383 P.3d 529 (2016). The warrant is manifestly valid.

A. THE ISSUING MAGISTRATE DID NOT ABUSE HIS DISCRETION IN FINDING PROBABLE CAUSE THAT THE EVIDENCE WOULD BE FOUND AT THE LOCATION AT THE PERIOD OF TIME IN WHICH THE SEARCH WARRANT WAS TO BE EXECUTED.

The Defendant challenges whether the information upon which the warrant relied was sufficiently current to justify a finding of probable

cause that the evidence of the crime would be at the location to be searched. Appellant's Opening Brief (AOB) at 13-16.

1. The standard of review for the issuance of a search warrant is abuse of discretion.

Because these issues were not raised to the superior court judge, the question is whether the district judge abused his discretion in issuing the search warrant. The issuance of a search warrant is a matter of a judicial discretion, making abuse of discretion the appropriate standard of review. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003); *State v. Johnson*, 79 Wn.App. 776, 779, 904 P.2d 1188 (1995).

The warrant is evaluated in a commonsense manner, rather than hypertechnically, resolving all doubts in favor of the warrant. *State v. Jackson*, 150 Wn.2d at 265. The affidavit supporting a search warrant must support the conclusion that the evidence is probably at the premises to be searched at the time the warrant is issued. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). A magistrate determines the currency of the information based on the time between the known activity and warrant and based on the nature and scope of the suspected activity. *State v. Lyons*, 174 Wn.2d at 361.

A search warrant for child pornography is sufficiently fresh if it

issues within several months or even years of evidence linking a location to the contraband. *United States v. Estey*, 593 F.3d 836, 840 (8th Cir. 2010) (search warrant issued five months after discovering information linking the defendant's residence with child pornography valid); *United States v. Horn,* 187 F.3d 781, 786-787 (8th Cir 1999) (warrant not stale three or four months after child pornography information was developed); *United States v. Davis,* 313 Fed. Appx. 672, 674, (4th Cir. 2009) (holding that information a year old is not stale as a matter of law in child pornography cases); *United States v. Hay*, 231 F.3d 630, 636 (9th Cir. 2000) (warrant not stale for child pornography based on six-month old information); *United States v. Lacy*, 119 F.3d 742, 745-46 (9th Cir. 1997) (warrant upheld for child pornography based on ten month old information); *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009), *review denied*, 168 Wn.2d 1027 (2010) (5 months okay, citing cases that upheld time periods as long as 2 years).

"Staleness" is rarely relevant when a computer file is the subject of the search, because a deleted file will remain on a computer and will normally be recoverable by computer experts until overwritten. *United States v. Seiver*, 692 F.3d 774 (7th Cir. 2012), *cert. denied*, 184 L. Ed. 2d 703 (2013) (finding a delay of "only" sevens month did not render a

warrant stale). *Accord State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009) (upholding warrant obtained after five month delay) (evidence in the form of metadata can likely be found on computer hardware even if the contraband itself can no longer be viewed on the computer).

Here, the affidavit provided significant information to show the evidence (including the image uploaded May 30) was likely to be on the premises at the time of the April 28 search.

2. The magistrate's decision to issue the warrant on the freshness of the information presented to him was tenable and reasonable where persons are not likely to discard their electronic equipment and users of child pornography are likely to transfer and save their contraband files when upgrading their equipment.

Microsoft became aware of an upload of child pornography via a Skype account and reported it that same day. CP 58. The Defendant argues that it may have taken Microsoft "days or weeks" to become aware of an upload, if "a technician [delayed reviewing] information previously flagged by the company's software." AOB at 15. The challenge disregards both the standard of review and the content of the 24-page affidavit in support of the search warrant.

Given the commonsense review required, the Defendant's claim is not reasonable given what the common person knows about administrators

deleting internet comments and social media postings with minutes of a user's posting for being merely offensive. More significantly, the Defendant's claim is not a fair reading of the affidavit, which describes an instantaneous hash tag procedure for identifying and reporting child pornography without the requirement of human review.

- ISPs (internet service providers) have a duty to report apparent child pornography "as soon as reasonably possible" under 18 U.S.C. § 2258(a)(1). CP 53.
- ESPs (electronic service providers) and ISPs monitor their subscribers' services in order to prevent their networks from serving as a conduit for illicit activity. They "routinely and systematically" attempt to identify suspected child pornography sent through their facilities. CP 52.
- Once they identify child pornography, they use a mathematical algorithm to convert the image into a hash value which is stored in a database. CP 52.
- The ISP is then able to detect a file "passing through" the ISP network which has the same hash value as one in the database without ever opening the file. CP 52-53.
- The ISPs decision to report a file is made solely on the basis of the match of the unique hash value. CP 53.

The ISPs' procedure and motivations suggest that detection and reporting of child pornography is immediately upon the image passing through (or being uploaded onto) the network. An image passes through the network and is matched in the database without a human every having to open the file. There would be no need for a technician's review and no reason for delay.

The Defendant argues that the "nature and scope" of the alleged crime is a single uploaded image. AOB at 15. This description only addresses what was known at the entry into the investigation. The full nature and scope of the crime also includes how and why child pornography is used and the Defendant's history.

The nature of drug crimes is that information about the location of drugs quickly becomes stale. People involved with illegal drugs are motivated not to hold onto drugs for long periods of time. High level dealers rarely handle the product themselves. Mid and low level drug dealers will move their stashes around to safe locations to prevent detection by law enforcement, competition, and thieves. And users will consume (i.e. use up) the illegal drugs soon after purchase. The same is not true of child pornography.

- Child pornography "is typically collected, stored and distributed [...]. [It] is not 'used up' as other types of contraband can be." CP 48.
- It is used both for the pornographer's sexual gratification and arousal and to groom child victims. CP 49. Accordingly, it typically will be stored so as to be easily accessible to the possessor, i.e. in a hard drive or cell phone or flash drive. CP 48-49.
- "Collectors of child pornography prefer not to be without their child pornography for any prolonged time period."[6] This behavior has been documented by law enforcement

[6] Contrary to the Defendant's argument (AOB at 16), it is not reasonable to believe that he would have removed his electronics from his home since the time of upload.

"throughout the world." CP 50.

- Email and other data files can be stored online with few limitations as to the size of the data. CP 49.
- "For these reasons contraband of this type can be and usually is stored for indefinite amounts of time by the possessors of this illegal contraband." CP 49.
- In the detective's experience, people who collect and trade in child pornography will store it **for years**, transferring the images to new computers and different storage mediums. CP 49 (emphasis added). When users of child pornography retire equipment, they do not delete the contraband, but transfer it to the new device or save it to the cloud. CP 49.
- The child pornography would have been uploaded from a device like a computer or cell phones. CP 50.
- If a user has deleted files from these devices, these may still be recoverable through computer forensics. CP 61.
- The Defendant's IP address was registered to Charter Communications with a geo-location at the Defendant's home address. CP 58.

Based on this information, it is highly reasonable to believe that the Defendant would have the electronics (cell phone or computer) at his home where he lived and had internet access through his cable company.

The Defendant claims that the scope of his suspected activity consisted of a single uploaded image – without any information to suggest a greater volume of child pornography over a long period of time. AOB at 15-16. This is incorrect. In 2012, the Defendant was investigated for possessing child pornography after his roommate reported finding images of nude teenage and preteen girls on his computer. CP 59. The Defendant is also a registered sex offender. CP 59.

The Defendant complains that information about "what criminals generally do" is insufficient. AOB at 13. The Defendant relies upon *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 589 (1999) and *State v. Keodara*, 191 Wn. App. 305, 312, 364 P.3d 777, 781 (2015), *review denied*, 185 Wn.2d 1028, 377 P.3d 718 (2016). Both cases regard whether mere suspicion of drug dealing provides reasonable cause to search a suspect's home or cell phone. Both cases are distinguishable.

It is not reasonable to believe, without more, that a drug dealer stores drugs in his home. But it is reasonable to believe that a distributor of child pornography who has distributed an image from his home would continue to possess the distribution/storage device (whether uploaded from a phone, laptop, or desktop) in his home for some months. People do not discard expensive electronic equipment (cell phones, computers) every month. As the affidavit explained, even when equipment is replaced, child pornography files are transferred and remain close at hand. CP 49.

The electronic equipment was not likely to have been replaced in the passage of less than a month. And if it had been, the files were likely to have been transferred and preserved. The warrant was not stale. The district court judge did not abuse his discretion in finding probable cause that evidence of the crime would still be present less than a month after the

upload.

B. THE DISTRICT COURT JUDGE DID NOT ABUSE HIS DISCRETION IN AUTHORIZING THE SEIZURE OF ITEMS RELATED TO THE CRIME ALLEGED AND OF DIGITAL FILES, THE CONTENT OF WHICH COULD NOT BE SCREENED UNTIL AFTER SEIZURE.

The Defendant complains that the warrant is overbroad. A search warrant is not overbroad when it sets certain limits on what is to be seized. *State v. Salinas,* 18 Wn. App. 455, 458, 569 P.2d 75, 77 (1977). The "particular description" requirement intends to (1) prevent general exploratory searches; (2) protect against "seizure of objects on the mistaken assumption that they fall within" the warrant; and (3) ensure that probable cause is present. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992); *see also Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L.Ed. 231 (1927).

> A good test of particularity is whether or not an officer with no knowledge of the facts underlying the warrant and looking only at the description of the property on the face of the warrant would be able to recognize and select the items described while conducting the search. For example, an officer with no knowledge of a particular case would be able to recognize and seize a "Smith & Wesson .38 caliber revolver, serial No. 18-205," if it were listed on the warrant. However, an officer executing a warrant describing the items sought only as "stolen property" would not know what to seize unless he was familiar with the facts underlying the warrant.

Pamela B. Loginsky, Confessions, Search, Seizure, and Arrest: A Guide for Police Officers and Prosecutors,[7] Washington Association of Prosecuting Attorneys (May 2015), 219.

The court should consider these three factors: (1) whether probable cause exists for all classes of items in the warrant; (2) whether the warrant sets out objective standards that allow the executing officer to decide what may be seized and what may not; and (3) whether the government was able to describe the things to be seized with any greater particularity. *United States v. Mann*, 389 F.3d 869, 878 (9th Cir. 2004).

Probable cause to seize is a lesser standard than probable cause to arrest. *United States v. O'Connor*, 658 F.2d 688, 693 n.7 (9th Cir. 1981). *Accord Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 56 L. Ed. 2d 525, 98 S. Ct. 1970 (1978). There must be probable cause to believe that the items sought are connected with criminal activity and will be found in the place to be searched. Justice Charles W. Johnson and Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 Seattle Univ. L. Rev. 1581, 1610 (2013).

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[7] http://70.89.120.146/wapa/materials/May%202015%20Final%20Search%20and%20Seizure.pdf

The nature of the offense may preclude a descriptive itemization and permit generic classifications and lists. *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). Courts have upheld warrants for specific items plus "any other evidence of homicide" of for "any and all evidence of assault and rape including but not limited to" specified items. *State v. Reid*, 38 Wn. App. 203, 211-12, 687 P.2d 861 (1984); *State v. Lingo*, 32 Wn.App. 638, 640-42, 649 P.2d 130 (1982). Ambiguity is tolerated when the description is as complete as can be reasonably expected. *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997) ("as specific as the circumstances and the nature of the activity, or crime, under investigation permits"); *see State v. Clark*, 143 Wn.2d 731, 754, 24 P.3d 1006 (2001) ("trace evidence" permissible when impossible to know beforehand what trace may be found).

Where the affiant does not have information regarding exactly where data has been stored, the warrant need only describe the hardware as specifically as is reasonably possible. *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997), *cert. denied*, 523 U.S. 1101 (1998). Here the detective did not know what the Defendant used to upload the image or where the Defendant had obtained the image, whether from a computer file or a printed page. In this circumstance, prosecutors recommend that police

describe the data to be seized as best they can as is reasonably possible under the circumstances. Loginsky at 251-52.

The warrant requested by Detective Knudson describes every item to be seized with as much particularity as was reasonably possible. It is apparent that the items relate to the alleged crime only and not to a general exploratory search.

The Defendant would limit the warrant to a single digital image. AOB at 22. This is not the meaning of the particularity requirement. The Defendant asks this Court to review every item, even those not itemized on appeal, in a hypertechnical manner. This is not the law; it is contrary to the standard of review. The court should look at whether the items as a class are sufficiently described so that officers are not left to their own devices or discretion in deciding what to seize. And the court should look at whether the items described have a relation to the crime alleged. If the police found books with child pornography, this would be related to the crime and relevant in the investigation. For that matter, the Defendant's possession of items such as a keyboard, printer, scanner, monitors, and computer reference manuals are all relevant to the investigation. They would demonstrate the scope of his operation and his ability or inability to do the offenses described.

The Defendant challenges the authorization to seize books and magazines, prints, negatives, films, video cassettes, digital video disks, and video recordings.[8] The warrant authorizes seizure of these items "containing visual depictions of minors engaged in sexually explicit conduct, as defined in RCW 9.68A.011." CP 70-71. The Defendant complains that affidavit does not demonstrate probable cause to seize these items. AOB at 2, 19. This is false. The affidavit provides probable cause to believe that the Defendant deals in child pornography. Thus all child pornography may be seized.

The Defendant complains that the "Digital Evidence" described in the warrant is overbroad. AOB at 20-21. First, the Defendant claims that the warrant should be limited electronic devices which hold child pornography. This claim demonstrates a serious lack of understanding regarding what evidence is necessary to make a prosecution and how digital evidence is preserved. This is like saying police can only seize blood with a BAC over .08. Seizure is a necessary prerequisite to examination. The only way police will know whether digital evidence contains child pornography is by seizing the device and then submitting it

[8] The Defendant adds a catchall of "and many other things." The State will not guess and what other things the Defendant intends, and can only address those items which the Defendant actually has named.

to tedious expert examination. This cannot be ascertained at the time of seizure. After a device is seized, it is transported to be copied. The police will not open the original files. Instead, they make a copy of files and then open the copies only. In this way, they do not alter the original metadata (e.g. retrieval dates) and cannot be accused of altering the files. Police may need expert technical assistance to view a file, for example, if a certain program is needed or if there is encryption or if the file has been corrupted and requires reconstruction. After a file is opened, police may need further medical assistance in determining whether the depicted person is truly a minor and expert forensic assistance to determine if the image depicts an actual person. The police cannot and are not required to open and review all electronic files at the Defendant's residence.

Second, the Defendant challenges the seizure of devices with a chip. AOB at 20. Nowhere is the word "chip" included in the warrant. The warrant authorizes seizure of equipment used to facilitate the transmission, creation, display, encoding, or storage of digital data. CP 71. The Defendant claims that this could include a digital thermometer. Because this claim was not made below, there is no record establishing either that a thermometer would fall under the scope of this warrant or that, if it had a chip, the chip would be limited in what it could store, such

that it could not be altered to store digital data related to this crime. In any case, the description is as complete as can be reasonably expected. The challenge is hypertechnical and ignores commonsense.

The Defendant complains that any reference to "child pornography" would invalidate the warrant. AOB at 21, citing *State v Perrone*, 119 Wn.2d at 553. In *Perrone*, the court invalidated the seizure of "child pornography" as vague, preferring that the warrant reference the statute. But here our warrant does not authorize seizure of "child pornography." It authorizes seizure of these items "containing visual depictions of minors engaged in sexually explicit conduct, as defined in RCW 9.68A.011." CP 70-71. This complies with the advice in *Perrone*.

The reference to "child pornography" is within an innocuous phrasing which authorizes seizure of records which identify the user by time stamp. CP 72. The warrant explains that this is relevant to the investigation, because it will help the police ascertain who was using the device at the time of any alleged crimes of child pornography. *State v. Bullock*, 71 Wn.2d 886, 890-91, 431 P.2d 195 (1967) (When the State seeks a warrant for "mere evidence" of a crime, rather than contraband or instrumentalities of a crime, the State must show probable cause to believe that the evidence will aid in apprehending or convicting a suspect.) So the

term is offered, not to describe the item to be seized, but to explain its utility in the investigation. The warrant adequately describes the crime six times in the four page warrant by statutory reference and language. In this context there can be no confusion about what is meant by the term. The complaint is, again, hypertechnical and not commonsense.

The Defendant challenges the IP addresses listed in the warrant. AOB at 23. He has not shown that any evidence related to those IP addresses was seized. If such evidence existed, and it appears not, then it would merely be suppressed under the severability doctrine.

> Under the severability doctrine, "infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant" but does not require suppression of anything seized pursuant to valid parts of the warrant. *United States v. Fitzgerald,* 724 F.2d 633, 637 (8th Cir.1983), *cert. denied,* 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 538 (1984); *See State v. Cockrell,* 102 Wash.2d 561, 570–71, 689 P.2d 32 (1984) (severability doctrine applied to permit severability of parts of warrant describing particular places to be searched, where there was insufficient probable cause to search those places); *Commonwealth v. Lett,* 393 Mass. 141, 470 N.E.2d 110 (1984). This doctrine has been applied where First Amendment considerations exist. For example, in the leading case on the partial invalidity-partial suppression question, the warrant properly described two obscene books by name but improperly described other items. *Aday v. Superior Court,* 55 Cal.2d 789, 362 P.2d 47, 13 Cal.Rptr. 415 (1961). The warrant was held valid as to the obscene books, but invalid as to the rest.

State v. Perrone, 119 Wn.2d 538, 556, 834 P.2d 611, 620 (1992). From the stipulation, it appears no evidence related to these IP addresses was used in obtaining his convictions. CP 76-79. It is a moot matter.

The Defendant's claim rests on a hypertechnical analysis and mischaracterization of law. The issuing magistrate authorized the seizure of items described with sufficient particularity and objective standards to instruct police and related to a crime for which there was probable cause.

C. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, COSTS SHOULD BE ASSESSED.

The Defendant argues that, if the State substantially prevails on appeal, costs should not be imposed against him. He concedes that the lower court found he has the ability to pay legal financial obligations (LFO's). AOB at 24. And he has not challenged the imposition of LFO's in this case. Yet the Defendant argues that his indigency for purposes of appointment of counsel equates to an inability to pay appellate costs. AOB at 24. This is false. Indigency for purposes of appointment of counsel on appeal is neither a bar to the assessment of appellate costs nor is it the legal standard. Rather the Defendant must prove to the commissioner or clerk that he "does not have the current or likely future ability to pay such costs" or the court "will award costs." RAP 14.2. No

showing of future inability to pay is made in this appellate record.

The record the Defendant would point to is the Order of Indigency on appeal (CP 120-22) and the Report as to Continued Indigency. Neither provides sufficient information to undermine the lower court's finding that the Defendant is able to pay LFO's. The Order only states that there had been a previous order of indigency and that there is a constitutional right to appeal. CP 121-22. Because there is a constitutional right to appeal, such orders are routinely granted on minimal information. The Report only indicates that the Defendant does not own significant property and has accumulated some small LFO debt.

However, the Report also demonstrates the Defendant's employability. There the Defendant states that, prior to his incarceration, he had been employed full time and at the same employer for several years. He continues to work even during his incarceration. The Defendant admits he has no mental or physical disabilities that may interfere with his ability to secure future employment.

This health and employment history is consistent with the PSI upon which the lower court relied. The Defendant has a strong employment record. CP 93-99. He is able to work, has been working, and intends to continue working. According to the PSI, the Defendant may

pursue additional education while incarcerated which will further increase his employability. CP 94. His cost of living is low. He will live with family upon his release.

As the PSI writer stated, Mr. Friedrich is atypical for an offender. CP 96. He does not have mental health problems or substance abuse problems. He is well educated. And he has worked steadily throughout his life. He has a strong work ethic, little debt, lives within his means with few expenses, and has strong family support. He can afford to pay the appellate costs if the State substantially prevails.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: September 25, 2017.

Respectfully submitted:

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Deputy Prosecuting Attorney

Jodi R. Backlund <backlundmistry@gmail.com>	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 25, 2017, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

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Transmittal Information

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Appellate Court Case Title:	State of Washington v. Jay Karl Friedrich
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